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Softscape, Inc.

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
OAKLAND DIVISION

SUCCESSFACTORS, INC., a Delaware  
corporation,

Plaintiff,

v.

SOFTSCAPE, INC., a Delaware corporation;  
and DOES 1-10, inclusive,

Defendants.

No.CV 08 1376 CW

**DEFENDANT SOFTSCAPE, INC.'S  
OPPOSITION TO PLAINTIFF'S EX  
PARTE APPLICATION FOR  
TEMPORARY RESTRAINING ORDER  
AND ORDER TO SHOW CAUSE RE:  
PRELIMINARY INJUNCTION**

Date of Filing: March 11, 2008

GOODIN, MACBRIDE, SQUERI, DAY & LAMPREY, LLP  
ATTORNEYS AT LAW  
SAN FRANCISCO

Defendant Softscape, Inc., hereby opposes the Ex Parte Application for Temporary Restraining Order and Order to Show Cause Re: Preliminary Injunction and Request for Expedited Discovery filed by SuccessFactors, Inc., on grounds that plaintiff has not, and cannot, demonstrate probable success on the merits or irreparable harm.

Plaintiff's application for a temporary restraining order arises out of a claim that defendant Softscape, Inc., ("Softscape") on a single occasion e-mailed "anonymously" to 25 of plaintiff's customers or prospective customers a Powerpoint presentation critical of plaintiff and its product and services, and allegedly containing some false information, on March 4, 2008. From this, plaintiff contends that it received a smattering of queries from recipients of the email, has been the subject of what appears to be very limited "negative discussion" on an internet message board, and, somehow, suffered irreparable harm for which the drastic relief of a temporary restraining order, and ultimately an injunction, is the proper remedy.

First, the Powerpoint presentation ("the Presentation") described by plaintiff was indeed created by Softscape. Declaration of Susan Mohr, General Counsel ("Mohr Decl."), ¶ 4. However, it was generated in-house and intended for internal use only by sales staff. Mohr Decl., ¶ 4.<sup>1</sup> Softscape did not authorize release or publication of the Presentation. Mohr Decl., ¶ 4. When this matter was brought to Softscape's attention, the CEO sent an e-mail to all sales staff reaffirming the confidentiality of the Presentation document and that it was not to be released outside of the company. Mohr Decl., ¶ 5.

Softscape is investigating the leak of the Presentation, which it considers to be

<sup>1</sup> It is doubtful that even if this e-mail was authorized it could lead to liability on the merits. Regarding allegations made by plaintiff regarding content of the Presentation, serious questions exist as to whether use of a password to obtain access to website information intended for potential customers violates the Computer Fraud and Abuse Act. See Lockheed Martin Corp. v. Speed, 81 U.S.P.Q.2d (BNA) 1669 (2006), dismissing CFAA claims where the gist of the complaint was not aimed so much at the allegedly improper access, but at the actions subsequent to that access. Cf. U.S. v. Phillips, 477 F.2d 215 (5<sup>th</sup> Cir. 2007) and cases cited therein. In Phillips, as in other CFAA cases, the defendant stole private information such as credit card numbers, bank account information, and social security numbers in order to engage in identity theft by using a sophisticated "brute force attack" program to hack into the database.

Plaintiff's Lanham Act claim is similarly vulnerable, given their admission that there is no likelihood of confusion here: there is no danger that a reader would mistake the material in question for something prepared by plaintiff. Nor is there any intent to pass off the material as plaintiff's own.

1 confidential information. Mohr Decl. ¶ 4. Based on information presently available to it,  
2 Softscape did not participate in its release to SuccessFactor's customers on the internet or  
3 otherwise, directly or indirectly, and is unaware of how the disclosure occurred. Mohr Decl., ¶ 4.

4 Second, to the best of Ms. Mohr's knowledge, Softscape has never and is not now  
5 using the Presentation in external sales meetings or marketing efforts. Moreover, Softscape has  
6 no intention to release on the internet, or otherwise publish externally, the Presentation. Mohr  
7 Decl., ¶ 5.

8 Plaintiff has not met the purposefully strict requirements for a temporary  
9 restraining order. Issuance of an ex parte temporary restraining order is an "emergency  
10 procedure," appropriate only when the applicant is in need of immediate relief. Wright, Miller &  
11 Kane, Federal Practice and Procedure: Civil 2d § 2951 (2007) (i.e., "when it is the sole method of  
12 preserving a state of affairs in which the court can provide effective final relief."). Plaintiff must  
13 show "immediate and irreparable injury, loss, or damage" will result without the emergency relief  
14 of a temporary restraining order. Id.

15 Plaintiff here has not established any harm, let alone irreparable harm. The totality  
16 of evidence of harm alleged by plaintiff consists of: (1) "numerous inquiries" from customers or  
17 prospective customers who received the single email and Presentation referenced above;<sup>2</sup> (2)  
18 "negative discussion" on an internet message board; and (3) a single analyst reducing the  
19 company's price target from \$15 to \$12, based apparently not on the distribution of the  
20 Presentation (of which he says, "[T]he claims appear to be unfounded"), but upon other economic  
21 factors, not the least of which were significant losses in 2005, 2006, and 2007, a possibility of  
22 increased unemployment (and less demand for its products), and the fact that the company "sells  
23 into a highly fragmented and price competitive HR market with relatively low barriers to entry."  
24 See Exhibit 4, p. 2 to the Declaration of Robert Bernshteyn in support of plaintiff's application.  
25 Plaintiff also alleges in very general terms "loss of prospects and goodwill," the full impact of

26  
27 <sup>2</sup> It should be noted that the *complete* e-mail from the single customer allegedly "lost" as a result  
28 of receiving the Presentation—as opposed to the portion quoted by plaintiff—indicates that it was  
not planning to buy SuccessFactor's product even *before* it received the "Naked Truth."

1 which might never be known. Such unsubstantiated, broad allegations are not sufficient to  
 2 establish irreparable harm. See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bishop, 839  
 3 F.Supp. 68 (D.C. Maine 1993) (irreparable harm not found where claim for relief based upon the  
 4 assertion of loss of goodwill and business reputation and other elements of damage that would be  
 5 “unascertainable” or “incalculable.”)

6 Moreover, as Ms. Mohr’s declaration establishes, there is no continuing threat  
 7 from distribution of the Presentation by Softscape. The company did not release the Presentation,  
 8 and does not intend to circulate or otherwise publish its confidential, internal work product.  
 9 Thus, given Softscape’s policy, plaintiff cannot establish, as it must for the extraordinary relief of  
 10 a temporary restraining order, that it would continue to suffer irreparable harm without the  
 11 requested order.

12 Because plaintiff has not met the burden required for a temporary restraining  
 13 order, its ex parte application should be denied. Furthermore, plaintiff’s Application for  
 14 Expedited Discovery, which it asks the Court to consider at this time, should be denied for  
 15 plaintiff’s failure to show good cause. There is no need for expedited treatment of discovery.  
 16 Defendant is already under an obligation to preserve evidence, and the Court can build into the  
 17 case management schedule, assuming plaintiff will continue to seek injunctive relief, a reasonable  
 18 discovery plan that will not unduly burden defendant.

19 Dated: March 12, 2008

Respectfully submitted,

GOODIN, MACBRIDE, SQUERI,  
 DAY & LAMPREY, LLP  
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 Francine T. Radford  
 Keith E. Johnson

By /s/Robert A. Goodin  
 Robert A. Goodin  
 Attorneys for Defendant  
 SOFTSCAPE, INC.

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